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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 297

LUTHER F. GRANT and SIBRICA V. GRANT,

Petitioners,

—v.—

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF OF PETITIONERS

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1. It is erroneous for the government to contend in its Brief in Opposition (p. 4) that there is no occasion for review by this Court "at this stage" of the proceedings.

First, if there is any question whether the dismissal of the petition was a "final" order for purposes of appeal, then the same consideration for granting certiorari in *DiBello* v. *United States*, No. 21, should apply here.

Second, the government has misstated the law in asserting that petitioners may raise the same questions at the trial. The objections have been ruled upon by the District Court and affirmed by the Court of Appeals. This ruling became the "law of the case." Petitioners do not have the right to ask nor could they expect the District Court to disregard or overrule the decision of the Court of Appeals, *United States* v. *Wheeler*, 172 F. Supp. 278 (W. D.

Penn. 1959, affd. 275 F. 2d 94, 3rd Cir. 1960), *United States* v. *Jennings*, 19 F. R. D. 311 (D. D. C. 1956).

2. The government's juxtaposition of the two statements, "constitutional right to an explicit warning of a possible criminal prosecution" and "failure to warn a potential defendant of his privilege against self-incrimination" (p. 5) either missed the point of the petition or is a device to confuse the issue. The petition makes no contention with respect to warning a taxpayer of his privilege against self-incrimination. What the petition does contend is that where a criminal tax investigator seeks evidence for prosecution, he should make his purpose clear, and not *deceive* the taxpayer into thinking the investigation is purely for *civil* tax purposes.

3. The government's reliance upon the Court of Appeals statement that petitioners' claim of "possible ignorance of rights is highly doubtful" (p. 6) is unfair on two counts. First, the statement of the Court of Appeals was factually erroneous, as the record shows Dr. Grant's conversation took place in 1960. The government's statement (p. 4) that Dr. Grant admitted he might have been informed by his accountant of the possibility of jail *before* he showed his books to the special agent, is such a misconstruction as to cast doubt on the integrity of the government attorney who drafted its brief. Howland began to obtain evidence from Dr. Grant on March 26, 1957 (13a, 23a). Since this Court does not have the typewritten transcript before it, petitioners will quote the very pages cited in the government's brief in order to point out its fallacy:

(R. 163) "*By Mr. Ray*:

* * * * *

Q. Now, Doctor, is this not a fact, that Henry Solomon at that time, at that point told you, Dr. Grant, you shouldn't be worrying about interest, that what they are trying to do is put you in jail, isn't that a fact, Dr. Grant? A. I am not sure if he told me that in 1958 or 1959 or 1960."

On redirect examination Dr. Grant fixed the time of his conversation with Solomon as after he had read the Medical Economics issue dated February 29, 1960 (87a, 88a).

Second, Judge Foley, trier of the facts, concluded that Dr. Grant was honest in testifying that the introduction of Howland as a Special Agent "had no significance" (102a).

The important issue presented for review is whether the Court of Appeals was correct in ruling that evidence was *voluntarily* submitted to a criminal investigator, and that the petitioner had *intentionally waived* his constitutional rights against self-incrimination and search and seizure without a warrant, even though the trial court found as a fact that the petitioner believed "he had to comply" with Howland's requests (71a, 74a, 86a).

The government's contention (p. 5) is erroneous when it implies that this Court is bound by what the courts below found as a matter of law. It is petitioners' contention that they did not consent to the illegal search and seizure by the government and therefore did not freely, unequivocally and voluntarily waive their constitutional rights. Since this is a question of law and not one of fact, this Court is not bound by the decisions of the lower courts.

As a matter of law it was error for the courts below to decide that both petitioners had consented to the search and voluntarily turned over the documents, without making the government prove its case or put in one shred of evidence, notwithstanding the burden of proving consent was strongly upon the government.

4. The government has failed to give this Court any reasons why the following questions presented by the petition are not of sufficient public importance to warrant review:

(a) Where there is ample opportunity to obtain a search warrant, is it good policy to permit special agents, as a general practice, to obtain self-incriminating evidence against taxpayers without a warrant?

(b) Where a revenue agent has suspended a civil tax investigation, should a special agent seeking evidence for criminal prosecution be required to make his purpose clear to the taxpayer, in order that any waiver of constitutional rights be made intentionally and consciously?

(c) Does the question of *waiver* depend upon the "background, experience and conduct of" petitioners (*Johnson* v. *Zerbst*, 304 U. S. 458), or are *all* taxpayers assumed as a matter of law to know that any routine civil tax investigation may turn into a criminal investigation (*United States* v. *Sclafani*, 265 F. 2d 408, 2nd Cir.)?

CONCLUSION

As stated on pages 11 and 12 of the petition, the deception of taxpayers by special agents is of great concern among lawyers, and presents problems relating to the conduct of government agents which should be reviewed by this Court.

Respectfully submitted,

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